No. 80-742

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In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL PORK PRODUCERS COUNCIL, ET AL., PETITIONERS

v.

ROBERT BERGLAND, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture's rule for the labeling of nitrate-free and nitrite-free meat products is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of 5 U.S.C. 706(2)(A).

2. Whether the Secretary was required to prepare an environmental impact statement under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, prior to promulgating this rule.

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JURISDICTION

The judgment of the court of appeals was entered on September 23, 1980. The petition for a writ of certiorari was filed on November 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge a rule (9 C.F.R. 317.17(b), 317.17(c), 319.2) promulgated by the Secretary of Agriculture that permits nitrate-free and nitrite-free meat products to be sold under labels bearing traditional product names such as "frankfurters," "bacon," and "pepperoni," but only if the product name is preceded by the term "Uncured," printed in the same letter size and type as the name, and if, in addition, the label contains the following statement adjacent to the product name in letters at least one-half its size:

NO NITRATE OR NITRITE ADDED
NOT PRESERVED—KEEP REFRIGERATED
BELOW 40° F. AT ALL TIMES

(Pet. App. 91-92). Such products must also "be similar in size, flavor, consistency, and general appearance" to products prepared with nitrates or nitrites (*ibid.*).

1. Since the turn of the century, the Secretary of Agriculture has been required to protect this country's meat supply by careful and detailed regulation and inspection. The Federal Meat Inspection Act of March 4, 1907, ch. 2907, 34 Stat. 1260, authorized the Secretary to inspect all

cattle, sheep, swine and goats destined for interstate or foreign commerce, to direct that all such animals showing symptoms of disease be set apart and slaughtered separately, to conduct a post-mortem examination of the carcasses and parts of all such animals intended for human consumption, to label "inspected and passed" all carcasses and parts "found to be sound, healthful, wholesome, and fit for human food" (34 Stat. 1261), and to label "inspected and condemned" all carcasses and parts found to be otherwise (*ibid.*). The Act also prohibited the interstate sale or transportation of meat or meat food products not slaughtered and packaged in accordance with its provisions, and specified that such products could not be approved for sale unless they had "actually been inspected" and found, *inter alia*, "to contain no dyes, chemicals, preservatives, or ingredients which render such meat food product unsound, unhealthful, unwholesome, or unfit for human food * * *" (*id.* at 1264). The Act authorized the Secretary to specify permitted product trade names and to prohibit the use of names that are false or deceptive (*id.* at 1262). Finally, it directed him to "make such rules and regulations as are necessary for the efficient execution of the provisions of this Act" (*id.* at 1264).

In 1967, the Federal Meat Inspection Act was recast in its present form by the Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584. As thus amended and codified at 21 U.S.C. 601 *et seq.*, the Inspection Act prohibits the transportation, receipt and sale of any "adulterated" or "misbranded" meat or meat food product. 21 U.S.C. 606, 610. A product is deemed adulterated if, *inter alia*, it contains unsafe color or food additives or any other substance "which may render it injurious to health * * *." 21 U.S.C. 601(m)(1) and (2). A product is misbranded if, *inter alia*, its

packaging fails to disclose that it "contains any artificial flavoring, artificial coloring, or chemical preservative" (21 U.S.C. 601(n)(11)), or if it "fails to bear * * * such other information as the Secretary may require * * * to assure that it will not have false or misleading labeling and that the public will be informed of the manner of handling required to maintain the article in a wholesome condition" (21 U.S.C. 601(n)(12)). The Act, as amended, continues to prohibit "false or misleading" labeling and to confer upon the Secretary authority to approve or disapprove trade names. 21 U.S.C. 607(d). Finally, "whenever he determines such action is necessary for the protection of the public [the Secretary] may prescribe: (1) the styles and sizes of type to be used with respect to material required to be incorporated in labeling to avoid false or misleading labeling * * *; [and] (2) definitions and standards of identity or composition for articles subject to this subchapter * * *." 21 U.S.C. 607(c). Required label information must be "prominently placed thereon with such conspicuousness * * * and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use." 21 U.S.C. 601(n)(6).

2. Nitrates and nitrites have long been added to meat products as color retainers and preservatives and have proved especially effective in retarding the growth of *Clostridium botulinum*, which are bacteria that produce a deadly toxin causing the food poisoning called botulism (Pet. App. 2). However, since the late 1960's concern increasingly has been voiced over the use of these additives in food because of growing evidence that they can combine with other ingredients in food or the body to form nitrosamines, agents shown to cause cancer in animals (*id.* at 2-3).

During the past decade, this problem was the subject of numerous meetings, conferences, and congressional hearings (Pet. App. 2-3). And in 1973, the Secretary of Agriculture appointed an Expert Panel on Nitrites and Nitrosamines to study the health problems involved and to consider alternative food processing methods (*ibid.*). See *Agriculture, Rural Development, and Related Agencies Appropriations for Fiscal Year 1979: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 95th Cong., 2d Sess. 2936, 2937 (1978) (Final Report on Nitrites and Nitrosamines to the Secretary of Agriculture by the Expert Panel on Nitrites and Nitrosamines).

More recently, questions have been raised concerning whether nitrites are themselves carcinogenic, as distinct from the role they play, if any, in forming nitrosamines. A 1978 report by Paul Newberne of the Massachusetts Institute of Technology determined that nitrites do cause cancer in laboratory animals (Pet. App. 4). However, an interagency working group of scientists from the Food and Drug Administration, the Department of Agriculture, the National Cancer Institute, and the National Institute of Environmental Health Sciences concluded in August 1980 that there is " 'insufficient evidence * * * to support the conclusion that sodium nitrite *per se* fed to rats causes cancer, based on the MIT study' " (*id.* at 4-5 n. 1). At the same time, the agencies expressed continuing "concern[] about the effects, if any, that nitrite consumption might have on the public's health," and pledged to support further research (*ibid.*).[1]

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[1]The courts have upheld the Secretary's refusal to impose an immediate ban on the use of nitrates and nitrites in meat products (*Public Citizen* v. *Foreman*, No. 79-1690 (D.C. Cir. July 31, 1980); *Schuck* v. *Butz*, 500 F. 2d 810 (D.C. Cir. 1974)), and have also rejected efforts by the food industry to invalidate rules established in 1978 (43 Fed. Reg. 32136, 32137 (1978); 9 C.F.R. 318.7(b) (1979)) to reduce the level of nitrates and nitrites in bacon and to establish testing procedures to prevent the formation of nitrosamines during cooking (*American Meat Institute* v. *Bergland*, 459 F. Supp. 1308 (D.D.C. 1978)).

Eventually, public concern about the possible health hazards of nitrates and nitrites in meat products took the form of requests to the Department of Agriculture from consumers, consumer interest groups, and some meat manufacturers for a rule permitting the preparation and sale of nitrate-free and nitrite-free meat products under traditional product names (Pet. App. 5).[2] On April 28, 1978, the Secretary gave notice of a proposed rule that would permit this if certain protective labeling and other requirements were met (43 Fed. Reg. 18193; Pet. App. 52-59). In the Background Information section that accompanied the proposed rule, the Secretary discussed the desire of some persons and groups for traditional meat products free of nitrates and nitrites, the proposed requirement for similarity of flavor and consistency, and the effectiveness of nitrates and nitrites in protecting against botulism (Pet. App. 53-54). The Secretary also noted that "[b]ased on agency experience and expertise * * *," continuous refrigeration of meat products at 40° or below is also effective against botulism, as are various fermentation, drying, and pickling procedures (*id.* at 54).

On August 20, 1979, following the receipt of 365 comments including a two-page submission by petitioner National Pork Producers Council (Comment 291, A. 9-10),[3] the Secretary filed his final rule on nitrates and nitrites, effective September 20, 1979 (44 Fed. Reg. 48959-48961; Pet. App. 83-93). In his introductory "Comments" to the final rule, the Secretary addressed various specific concerns

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[2]USDA regulations then in effect prohibited the production, sale or distribution of nitrate-free and nitrite-free products under traditional names (Pet. App. 5).

[3]"A." refers to the joint appendix filed in the court of appeals.

raised by the statements received during the comment period (Pet. App. 84-91). In response to petitioner's concern about product confusion, the Secretary added to the final rule the requirement that products without nitrates or nitrites bear the term "Uncured" next to the product name (*id.* at 85). The Secretary addressed various other industry concerns as well.

3. On September 20, 1979, petitioners brought suit in the United States District Court for the Southern District of Iowa to enjoin the enforcement or application of the rule and to declare it "arbitrary, capricious, an abuse of discretion and not otherwise in accordance with law" (Pet. App. 22, 24).[4] They also claimed that the Secretary had failed to comply with the National Environmental Policy Act (*id.* at 44).

On February 12, 1980, following a trial on the merits, the district court concluded that "the USDA acted arbitrarily and capriciously in promulgating the questioned rule and in establishing the labeling standards" (Pet. App. 34), that the rule was promulgated for the improper "purpose of facilitating markets for uncured products, and thereby increasing the consumption of those products, at the expense of producers of cured products" (*id.* at 36), that the requirement that uncured meat products be similar to cured products, in size, flavor, consistency and general appearance is irrational and, insofar as flavor is concerned, "subjective"

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[4]The National Independent Meat Packers Association (NIMPA) was permitted to intervene as a party-plaintiff in the district court, filed a separate complaint, and participated fully there and in the court of appeals. By letter of November 11, 1980, its counsel advised the Clerk of this Court "that [NIMPA] has determined not to petition for a writ of certiorari * * * or otherwise participate * * *."

and "unorthodox" (Pet. App. 37-41), and that the USDA's "failure to make a determination as to whether an [environmental impact statement] should have been prepared and [its] failure to develop a reviewable administrative record supporting a negative decision were arbitrary, capricious, and unreasonable * * *" (*id.* at 47).

The court of appeals reversed (Pet. App. 1-20). After noting in passing that the district court had exceeded its authority by conducting an expansive evidentiary hearing (Pet. App. 9; see *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971)), the court of appeals determined (Pet. App. 10-13) that there was a reasonable basis in the administrative record for the Secretary's rule. The court observed (*id.* at 11):

> The agency was not only fully aware of the botulism risk, it considered evidence of the effect of the proposed regulation, particularly the labeling requirements, on that risk. It noted that some of the 365 comments submitted to it "expressed concern whether such labeling provisions would be adequate to protect against botulism with respect to * * * unpreserved products." * * * Nevertheless, the agency found persuasive evidence that the benefits of the regulation would outweigh any potential safety problem. Many of the comments demonstrated consumer awareness of the potential dangerous consequences of marketing and consuming meat products that do not contain nitrates or nitrites. Many commentators referred to the positive safe experiences they had had with purchasing uncured products in the past. Others stated that their

> knowledge of food products came from a careful reading of product labels. Still others indicated an understanding of the term "uncured" and expressed a willingness to adhere to the instructions on the label in exchange for an opportunity to buy meat products without nitrates or nitrites.

The court further noted that "not only was the agency aware of the botulism danger at the outset, and not only did it consider further evidence of the danger, once it reviewed the evidence, it took positive steps to eliminate the chance of any danger resulting from the regulations" (Pet. App. 12). Addressing petitioners' other arguments, the court of appeals held that the Secretary had considered possible environmental effects and had properly determined that no environmental impact statement was required (*id.* at 19-20), and "that the regulations are a rational response to the legitimate requests of concerned consumers and were not promulgated for an unlawful purpose" (*id.* at 16).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or another circuit, and thus does not warrant further review.

1. The Secretary's labeling rule "is 'reasonably related to the purposes of the enabling legislation,' " is entitled to deference, and was properly sustained by the court of appeals. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973) (citation omitted); accord, *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11-13 (1980); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 559-560 (1980); *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

a. Petitioners seek to attract this Court's attention by their extravagant claim that the Department of Agriculture has "arbitrarily exposed the American consumer to the deadly hazards of botulism" (Pet. i).[5] The court of appeals squarely rejected this assertion, concluding that the Secretary was fully aware of and sensitive to the dangers of botulism and took adequate precautions to guard against it (Pet. App. 11, 12, 13).

Stripped of its rhetoric, petitioners argument that the rule is arbitrary and capricious (Pet. 12-18) hinges essentially on the contention that the Secretary failed to conduct a searching inquiry into the efficacy of precautionary labeling and that the court of appeals repeated the error. However, more than 70 years ago Congress made a legislative determination that labeling is an appropriate and effective means of protecting consumers of meat products and of informing them of the hazards associated with meat consumption. The Secretary is permitted, indeed required, to accept this legislative determination in fashioning appropriate labeling for

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[5]Proponents of the rule promulgated by the Secretary could have claimed with equal fervor that failure to adopt the rule would have arbitrarily exposed the American consumer to the deadly hazards of carcinogenic nitrosamines. Missing from the petition is an appreciation that the rule at issue was prompted by conflicting health concerns as grave as those on which petitioners focus. In upholding the Secretary's refusal to impose an immediate ban on the use of nitrates and nitrites as meat additives (see page 4 note 1, *supra*), the D.C. Circuit captured the Solomonic nature of the decisions the Secretary is called upon to make (*Public Citizen* v. *Foreman*, No. 79-1690 (July 31, 1980), slip op. 16):

> The use of nitrites in curing bacon presents difficult medical and scientific questions. Some believe the use of nitrites causes cancer while others claim nitrites are needed to prevent botulism. Such questions go beyond our competence, and we must defer to the administrative agencies with their technical expertise on these matters. We find that the USDA in its regulation of nitrites has acted lawfully. Given the serious medical questions involved, we must hope they have acted wisely as well.

meat products. See *Consumer Porduct Safety Comm'n* v. *GTE Sylvania, Inc.*, No. 79-521 (June 9, 1980), slip op. 21; *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-558 (1978). Petitioners have not cited a single decision in which an agency was required to engage in explicit fact-finding on the efficacy of labeling once Congress declared it a sufficient and appropriate means of protecting consumer interests.[6]

Petitioners particularly focus on "the plight of illiterates, non-English speaking consumers and those with infirm vision" (Pet. 13), and stress the inefficacy of labeling as a protection for them.[7] However, the Federal Meat Inspection Act, as amended, requires that mandatory label information be conspicuous "and in such terms as to render it

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[6]Of course, the Secretary must determine what type of labeling will be effective in a particular set of circumstances and will adequately protect the varied interests of consumers. However, as this Court observed in a different context, such determinations are "primarily of a judgmental or predictive nature * * *." *FCC* v. *National Citizens Comm. for Broadcasting, supra*, 436 U.S. at 813. Therefore, explicit fact-finding is not required and is often not possible. *Id.* at 814. In any event, in the instant case, as the court of appeals observed (Pet. App. 11-13), the Secretary not only "considered evidence of the effect of the proposed regulation, particularly the labeling requirements, on" the risk of botulism (*id.* at 11), he also responded to the " 'expressed concern [of some who commented on the proposal] whether such labeling provisions would be adequate to protect against botulism' " (*ibid.*) by requiring in the final rule that the term "uncured" be part of the product name of all nitrate and nitrite-free products, and by deleting (because of the confusion it was likely to engender) a proposed provision that would have permitted the sale under traditional product names of low-nitrate products labeled "Not Fully Preserved, Must Be Refrigerated Below 40° F. At All Times" (*id.* at 12). Thus, it is evident from the record that the Secretary carefully considered the efficacy of the particular labeling requirements set forth in the rule he promulgated. See also pages 7-8, *supra*.

[7]Such persons also would not be able to differentiate between traditional names and the new ones petitioners would have manufacturers of nitrite-free products adopt, or between products labeled "cured" or "uncured" and those labeled "imitation," a designation petitioners pressed in the district court (Pet. App. 41).

likely *to be read and understood by the ordinary individual* * * *." 21 U.S.C. 601(n)(6) (emphasis added). Statutory schemes for the protection of health, safety, and property quite commonly rest on the assumption that the ordinary person in this country can read English or will seek the aid of someone who can, and will act upon reasonable warnings and instructions.[8]

b. The court of appeals correctly rejected petitioners' claim (Pet. 22-23) that the rule here at issue was promulgated for the allegedly unlawful purpose of promoting the interests of nitrite-free product manufacturers at the expense of competitors who use the additive (Pet. App. 13-16). As noted above, the rule constitutes a measured response to the articulated desire of consumers and producers for products that they reasonably believe to be less injurious to health than products readily available in the market (*id.* at 53, 84). As the court of appeals recognized (*id.* at 14), the Secretary is obligated by statute "to ensure that the products desired by consumers be made available to them in a form and manner consistent with the public health and welfare. Every time the Secretary approves a product's ingredients or label, he, in one sense, is promoting that product. To be sure, the agency should not be promoting a particular company or a particular product of a particular company, but merely fulfilling consumer desires, while ensuring consumer health and safety, does not constitute unlawful promotion."

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[8]See, *e.g.*, Securities Act of 1933, 15 U.S.C. 77a *et seq.*; Automobile Information Disclosure Act, 15 U.S.C. 1231 *et seq.*; Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331 *et seq.*; Fair Packaging and Labeling Act, 15 U.S.C. 1451 *et seq.*; Truth in Lending Act, 15 U.S.C. 1601 *et seq.*; Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701 *et seq.*; Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1901 *et seq.*, especially 15 U.S.C. 1981-1989; Consumer Product Safety Act, 15 U.S.C. 2051 *et seq.*

In any event, even if the challenged rule expands the market for nitrate and nitrite-free meat products, petitioners need not suffer economic injury since they may compete in the expanded market by producing such products and complying with the new labeling restrictions. In fact, one-third of the members of the National Independent Meat Packers Association, plaintiff-intervenor below, already trade in products free of nitrates and nitrites (Complaint of Intervenor para. 2, A. 117-118). On the other hand, should petitioners prefer not to enter that market, they are free to continue business as usual. As the court of appeals observed (Pet. App. 16), "[u]nder the new rules, no meat packer is required to manufacture nitrate and nitrite-free products, no wholesaler is required to supply them, and no retailer is required to stock them. Furthermore, the production and sale of nitrate and nitrite-preserved products are unaffected. In short, * * * the regulations are a rational response to the legitimate requests of concerned consumers and were not promulgated for an unlawful purpose."

2. The court of appeals rejected petitioners' contention (Pet. 24-25) that the Secretary violated the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, by failing to file an environmental impact statement (EIS) in connection with the challenged rule and by failing both to articulate his reasons for not doing so and to develop a record to justify his decision. In essence, the court concluded (Pet. App. 19-20) that since the proposed rule did not significantly affect the environment, an EIS was not required, and that the Secretary's determination that the proposed rule presented no significant health dangers (its only arguable environmental impact) was fully supported by the record. That

decision is correct and does not conflict with the decision of any other circuit.[9]

An environmental impact statement is required only when an agency proposes "major Federal actions significantly affecting the quality of the human environment." 42

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[9]Petitioners insist (Pet. 24) that the Second, Seventh, and District of Columbia Circuits "require a rulemaker who determines not to file a[n] * * * environmental impact statement (EIS) to assess all relevant factors considered in that determination, state its reasons for not preparing an EIS, and affirmatively develop a reviewable administrative record in support of the decision not to file an EIS." However, the cases cited by petitioners do not support so broad a proposition and do not conflict with the instant case. In *Nucleus of Chicago Homeowners Ass'n* v. *Lynn*, 524 F. 2d 225 (1975), cert. denied, 424 U.S. 967 (1976), the Seventh Circuit considered the contention, advanced by persons owning homes adjacent to part of a proposed scattered-site low-income public housing project, that HUD's decision not to file an EIS was not supported by a record sufficiently developed for judicial review. While concluding that "NEPA does require that an agency affirmatively develop a reviewable administrative record supportive of a decision not to file an impact statement" (524 F. 2d at 231), the court added that "the content and volume of such a record depend upon the particular federal action proposed. A concise statement may be sufficient to support an agency finding of no significant environmental impact if it is grounded on supporting evidence" (*ibid.*; citation omitted). It then reviewed the administrative record in much the same way as did the court of appeals in the instant case and concluded both that a satisfactory basis for judicial review existed and that HUD had properly determined that no EIS was necessary. In *Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Comm'n*, 481 F. 2d 1079 (1973), the D.C. Circuit announced (*id.* at 1094) that when an agency "has decided that a NEPA statement is not yet necessary, it should state reasons for its decision." However, in the absence of any such statement of reasons the court "resort[ed] to other material in the record to determine whether the [AEC] properly decided not to draft a[n environmental impact] statement * * *" (*id.* at 1095). The third case on which petitioners rely, *Trinity Episcopal School Corp.* v. *Romney*, 523 F. 2d 88 (2d Cir. 1975), concerned a NEPA provision not at issue in the instant case and is thus inapposite.

Petitioners also rely on regulations promulgated by the Council on Environmental Quality, 40 C.F.R. 1500 *et seq.* (1979). However, as the district court noted (Pet. App. 45 n.3), those regulations were not promulgated until well after the rule challenged here was proposed.

U.S.C. 4332(2)(C). See *Andrus* v. *Sierra Club*, 442 U.S. 347, 350-351 n.2 (1979); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 399-401 (1976). Petitioners' assertion (Pet. 24) that "[t]he present rulemaking [has been] conceded by the Department to be of [a] 'major' character" is misleading. The "Note" to the final rule cited by petitioners (Pet. App. 93) states that the rule is "significant" for purposes of the President's Executive Order on "Improving Government Regulations," Exec. Order No. 12044, 43 Fed. Reg. 12661 (1978), an Executive Order concerned with making federal regulations "as simple and clear as possible" (*id.* at Section 1). That determination has no bearing on whether the rule is a "major Federal action" for purposes of NEPA (42 U.S.C. 4332(2)(C)).[10] Moreover, we question whether a rule setting forth labeling requirements for food additives can affect the "environment" as that term is used in NEPA. See *Image of Greater San Antonio* v. *Brown*, 570 F. 2d 517, 522 (5th Cir. 1978); *Breckinridge* v. *Rumsfeld*, 537 F. 2d 864, 865 (6th Cir. 1976), cert. denied, 429 U.S. 1061 (1977); *American Meat Institute* v. *Bergland*, 459 F. Supp. 1308, 1315-1316 (D.D.C. 1978); *Township of Dover* v. *United States Postal Service*, 429 F. Supp. 295, 297 (D. N.J. 1977). In any event, the sole conceivable ground for concluding that the rule constitutes an action "significantly affecting the quality of the human environment"—namely the health risks it assertedly engenders—is, as the court of appeals held (Pet. App. 20), "unsupported" by the record.

Even if, as petitioners urge, the refusal to prepare an environmental impact statement must be buttressed by articulated reasons and a reviewable administrative record,

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[10]Although we do not dispute that the federal undertaking here was "major," if only in terms of its impact upon the affected industries, we note that the Eighth Circuit sitting en banc has cautioned against bifurcating the pertinent language of the statute and has concluded that "major

that requirement is met here. The possible health consequences of the rule were fully considered by the Secretary prior to its promulgation. In the Background Information section accompanying the proposed rule, he stated that "[b]ased on agency experience and expertise, it appears that [nitrate and nitrite-free] products would * * * be protected against botulism" by proper refrigeration or other preservative methods and that proper labeling, as proposed, would avoid any product confusion (Pet. App. 54-55). These conclusions were further elaborated in the Final Impact Statement, where the Secretary stated that "[t]his regulation is not expected to result in any increase in incidence of food poisoning from *Clostridium botulinum* toxin types A and B, those primarily associated with the red meats" (Pet. App. 80). Similarly, in the Supplementary Information section accompanying the final rule, the Secretary reviewed the rationale for the labeling requirement, considered the concerns expressed in various comments, and again concluded that no significant health risk is posed by the rule (*id.* at 84-91). Thus, even assuming *arguendo* that the Secretary was required to explain why he did not prepare an environmental impact statement, he substantially fulfilled that obligation here, as the court of appeals correctly held (*id.* at 19-20). See *Minnesota Public Interest Research Group* v. *Butz*, 498 F. 2d 1314, 1320 (8th Cir. 1974) (en banc).

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federal actions" and "significantly affecting the quality of the human environment" should not be read as separate or independent tests. *Minnesota Public Interest Research Group* v. *Butz*, 498 F. 2d 1314, 1321-1322 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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